Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GRANT R. BAKIN, M.D.,

Petitioner,

v.

COX ENTERPRISES, INC., et. al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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August 5, 1993

QUESTIONS PRESENTED

I. WHETHER THE INDEPENDENT APPELLATE REVIEW DOCTRINE DEFINED IN *BOSE CORPORATION V. CONSUMERS UNION OF THE UNITED STATES, INC.*, 466 U.S. 485 (1984) IS APPLICABLE TO A PLAINTIFF IN A LIBEL CASE WHERE FIRST AMENDMENT RIGHTS ARE ASSERTED - IS THE INDEPENDENT APPELLATE REVIEW DOCTRINE A TWO WAY STREET?

II. DID THE COURT OF APPEALS OF GEORGIA ERR IN REVERSING THE DENIAL OF SUMMARY JUDGMENT TO THE RESPONDENTS ON THE FACTS ESTABLISHED IN THIS CASE?

LIST OF PARTIES

Parties

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Cox Enterprises, Inc.
Elizabeth Coady
Jay Smith
Jim Walls
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Glenn McCutchen
John W. Walter, Jr.
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Insurance Companies

NONE.

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COX ENTERPRISES, INC., et. al.,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

The Petitioner, Grant R. Bakin, M.D. respectfully prays that a writ of certiorari issue to review the judgment of the Georgia Court of Appeals Decided December 4, 1992, certiorari denied by the Georgia Supreme Court on April 7, 1993.

OPINIONS BELOW

The opinion of Fulton County Superior Court, which is not reported, is reprinted in Appendix "A".

The opinion of the Georgia Court of Appeals, which is reported, but is reprinted for the convenience of this Court as Appendix "B".

The denial of the petitioner's application for certiorari to the Supreme Court of Georgia, is reprinted in Appendix "C".

This Court granted an order extending the time for the filing of this petition for certiorari to this court on the 19th day of July, through and including August 6, 1993.

JURISDICTION

Jurisdiction of the Supreme Court of United States to review the judgment of the Court of Appeals of the State of Georgia (Cert. to the Supreme Court of Georgia denied) exists under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution, U.S. Const., Amend. I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment of the United States Constitution, U.S. Const., Amend. XIV, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

At 1:00 a.m. on February 19, 1989, Gregory Alfonzo Dozier was involved in a fight involving a knife and broken glass in which he was injured. He was treated at Clayton County General Hospital in the southern Atlanta area, where he died at approximately 9:17 a.m.

On February 22, 1989 and periodically thereafter, the Atlanta Constitution and the Atlanta Journal, both newspapers owned and operated by the respondents, ran a series of articles in which it was stated as fact that Mr. Dozier bled to death while in the care of Grant R. Bakin, M.D. at the Clayton County General Hospital Emergency Room.

On the 24th day of September, 1991, the Superior Court of Fulton County denied the Respondents' motion for summary judgement.

On December 4, 1992, the Court of Appeals of the State of Georgia entered an opinion reversing the trial court and granting summary judgment to the Respondents.

On April 8, 1993, the Supreme Court of the State of Georgia denied the Petitioner's Petition for Certiorari.

On July 19, 1993, this court granted the Petitioner an extension of time to file this Petition for Certiorari through and including August 6, 1993.

STATEMENT OF FACTS

On February 19, 1989, Gregory Alfonzo Dozier became acutely intoxicated on alcohol and cocaine, became involved in a dispute involving knives and broken glass, received several lacerations to his face and arms, stripped his torso of clothing, and lay down in the street at 1:00 a.m. in near freezing weather. He was taken to the Clayton General Hospital Emergency Room forty five minutes later, where he was treated for coma, respiratory arrest, anemia, acute alcohol intoxication, possible cocaine overdose, cardiac arrhythmias, hypothermia (rectal temperature of 91.5 degrees), hypovolemia, and lacerations. Grant Bakin, M.D. treated him as emergency Room physician for two hours and forty five minutes before placing him under the care of the hematologist (**blood specialist**)/internist Dr. Choi, and dictated clear notes on his treatment of Mr. Dozier before going off duty at

approximately 7:00 a.m. Mr. Dozier died at about 9:17 a.m. while in surgery of a cardiac arrest.

Mr. Dozier bled profusely at the scene of his injury, but all records and eyewitness accounts establish that no medically significant bleeding occurred while he was under the custody of the police, being treated by the Emergency Medical Technicians who brought him to Clayton General Hospital, or being treated at the hospital.

This application for Certiorari stems from a series of newspaper articles beginning February 22, 1989 with an article entitled **"Case of Man Who Bled to Death in Clayton Hospital Probed"** as its headline and identifying the Petitioner as the physician treating him in the Emergency Room. This article identified Major Hobbs as a police source and a Lt. Shockley at the DeKalb Medical Examiner's office as confirming that an autopsy determined that Mr. Dozier bled to death. A quote from Mr. Dozier's sister Linda was inserted here discussing how unbelievable it was that her brother bled to death in the hospital. The full texts of this article, the article that followed, and the most recent article in the series are attached hereto as Appendix "D".

The actual facts became known to the Defendants on the day the first article was published. Lt. Shockley contacted reporter Coady the next day to inform her that he had been misquoted, and that the facts attributed to him in the article were not accurate. He also requested that she not cite him as a source for that misinformation. Major Hobbs also informed Ms. Coady of the existence of a 591 foot trail of blood at the crime scene, and that his records showed no bleeding at the

hospital except during the operative and preoperative treatment of the laceration by a surgeon, who not only stemmed that bleeding, but supplemented the blood supply through transfusions prior to Mr. Dozier's death. A copy of Lt. Shockley's affidavit is attached as Appendix "F".

The true facts regarding the medical treatment received by Mr. Dozier from Dr. Bakin are of record in this case. Mr. Dozier was immediately treated for Hypothermia and blood loss. He was transfused with warmed fluids and four units of packed red blood cells before his death. The death occurred in the operating room, not the emergency room, and Dr. Bakin was not even on duty at the hospital at the time of death, and had in fact been off the case for approximately five hours at the time of death. A chronological breakdown of the events involved in the treatment of Mr. Dozier extracted from the medical records is attached hereto as Appendix "F".

On March 17, 1989 the DeKalb County Medical Examiner, Dr. Joseph Burton, issued an autopsy report opining that the primary cause of Mr. Dozier's death was hypovolemia, with significant other contributing factors of **hypothermia** and **acute alcohol intoxication**. The report further describes that only minimal bleeding occurring at the hospital, where Dozier died in the operating room.

During the two years after Mr. Dozier's death, the Respondents have published a series of articles that have stated in more than two dozen articles in form or substance that Mr. Dozier's death involved "the case of a man who bled to death after seven hours in the emergency room." Excerpts from these articles are attached as Appendix "G".

STANDARD AND SCOPE OF REVIEW

The standard for the scope of review of the trial court's grant of summary judgment in favor of the Respondent is whether based on all the evidence "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. 9-6-56(c). In order to make such a determination, the trial court must view the evidence in a light most favorable to the non-movant. *Osterneck v. E.T. Barwick Industries, Inc.*, 79 F.R.D. 47 (N.D. Ga. 1979).

The standard itself is whether the evidence is sufficient to create an issue of fact for the jury. In determining whether the evidence is sufficient, the District Court is not free to weigh the evidence, to pass on the credibility of the witnesses, or to substitute its judgment of the facts for that of a potential jury. *Alman Bros. Farms & Feed Mill, Inc. v. Diamond Lab, Inc.*, 457 F. 2d 1295 (5th Cir. 1971). Additionally, the evidence must be viewed in the light most favorable to the party answering the motion made and must give that party the benefit of all reasonable inferences from the evidence. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE INDEPENDENT APPELLATE REVIEW DOCTRINE DEFINED IN *BOSE CORPORATION V. CONSUMERS UNION OF THE UNITED STATES, INC.*, 466 U.S. 485 (1984) IS APPLICABLE TO A PLAINTIFF IN A LIBEL CASE WHERE FIRST AMENDMENT RIGHTS ARE ASSERTED.

This Court has long recognized that constitutional guarantees are meaningless protections if they may be freely subverted through the disingenuous manipulation of facts. To prevent first amendment freedoms from being lost in the process of the application of law to fact the Court has held that appellate courts have the duty to "make an independent examination of the whole record" in order to make sure "that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan,* 376 U.S. 254, 284-86 (1964). See also *NAACP v. Claiborne Hardward,* 458 U.S. 886, 933-34 (1983); *Greenbelt Cooperative Publishing Ass'n v. Bressler,* 398 U.S. 6 (1970); *St. Amant v. Thompson,* 390 U.S. 727, 732-33 (1968).

This Court recently reaffirmed the independent appellate review doctrine in *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485 (1984). This court further acknowledged that the doctrine has most often been applied in circumstances arising from State Courts, such as the case at bar. *Id.* at 499. However, to date, no case has been ruled upon in which this court addressed whether this doctrine may be applied for the benefit of a plaintiff in a libel case.

Does the independent appellate review doctrine cut both ways or is it a one way street in First Amendment cases, allowing the appellate court to independently examine the record to reverse a factual finding that went against the plaintiff? No finding of fact or law in any case decided by this court has stated a rule or rationale that would limit this doctrine to benefit only the media defendant. Thus the Eleventh Circuit and the Fifth Circuit adhere to the two way interpretation. *Don's Porta Signs, Inc. v. Clearwater, Florida,*

829 F. 2d 1051 (11th Cir., 1987), U.S. Cert. denied at 108 S.C. 1280), and *Lindsay v. City of San Antonio,* 821 F.2d 1103, 1107 (5th Cir. 1987), U.S. Cert. denied at 108 S.C. 707. See *Peel v. Attorney Disciplinary Comm'n of Ill.,* 496 U.S. 91, 108 (1990).

II. DID THE COURT OF APPEALS OF GEORGIA ERR IN REVERSING THE DENIAL OF SUMMARY JUDGMENT TO THE RESPONDENTS ON THE FACTS ESTABLISHED IN THIS CASE?

The undisputable facts of this case are that Gregory Alfonzo Dozier was brought to Clayton General Hospital, where he received reasonable and appropriate care by Dr. Bakin in the emergency room, but that he died many hours later and not due to Dr. Bakin's treatment.

The Respondents first identified the Petitioner as Mr. Dozier's Emergency Room physician, and then in subsequent articles repeatedly stated that Mr. Dozier bled to death in the emergency room. There is no question that these statements are false in that Mr. Dozier neither bled in the emergency room, nor died there.

The Honorable Court of Appeals of Georgia's opinion makes its decision on the basis of a "disingenuous manipulation of facts" as follows: (1) At page 5 of the decision as originally printed, the Court of Appeals of Georgia incorrectly states that the last 29 articles do not refer to Dr. Bakin; (2) at page 8 of the decision as first printed, the Court incorrectly states that an average reader would not draw the conclusion that Dr. Bakin carelessly let Dozier bleed to death

in the emergency room or that his treatment was deficient; and (3) at page 10 of the decision as first printed the Georgia appellate Court incorrectly states that the articles contain no hurtful innuendo regarding appellant's character or behavior, and the articles lack the element of personal disgrace necessary for defamation. These findings of fact are clearly erroneous (See Appendix "D" and "G" - copies of the originals of the subject newspaper articles have been filed with the Court of Appeals of Georgia, and are part of the record to this case); this court should exercise the independent appellate review doctrine and reverse the court below. Constitutional guarantees are meaningless protections if they may be freely subverted through the disingenuous manipulation of facts.

CONCLUSION

The independent appellate review doctrine offers protection from abuses of discretion in the lower courts of this country. To provide proper adjudication of First Amendment claims, the independent appellate review doctrine should be applied to a Plaintiff victim of an unscrupulous press. Certiorari should be granted.

Respectfully Submitted,

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August 5, 1993

Appendix A

FULTON SUPERIOR COURT
STATE OF GEORGIA

GRANT BAKIN, M.D.,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	D074346
COX ENTERPRISES, INC., d/b/a	:	
THE ATLANTA JOURNAL AND	:	
CONSTITUTION, ELIZABETH	:	
COADY, JAY SMITH, JIM	:	
WALLS, RON MARTIN,	:	
GLENN McCUTCHEN, JOHN W.	:	
WALTER, Jr. and MAJOR	:	
DWAYNE HOBBS and ARNOLD	:	
ROSENFELD,	:	
Defendants.	:	

ORDER ON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

The above and foregoing case having come on regularly before me for a hearing on the Motion For Summary Judgment of Cox Enterprises, Inc., d/b/a The Atlanta Journal and Constitution, Elizabeth Coady, Jay Smith, Jim Walls, Rom Martin, Glenn McCutchen, John W. Walter, Jr. and Arnold Rosenfeld and after argument of counsel and review of the file

of record, Defendants' motion for summary judgment is hereby denied.

This 24th day of September, 1991.

/s/ _____
WILLIAM W. DANIEL, JUDGE
FULTON SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

Appendix B

COX ENTERPRISES, INC. et al.

v.

BAKIN

No. A92A1045

COURT OF APPEALS OF GEORGIA
426 S.E.2d 651, 206 Ga. App. 813

December 4, 1992, Decided

JUDGES

Cooper, Judge. Sognier, C.J., and McMurray, P.J., concur.

AUTHOR: COOPER

OPINION

We granted appellants' application for interlocutory appeal to determine whether the trial court erred in denying appellants' motion for summary judgment in appellee's suit for libel. This case involves 31 articles published in The Atlanta Journal & Constitution ('the newspapers') over a two-year period after the death of Gregory Dozier at Clayton General Hospital.

Appellee, Dr. Grant Bakin, was the physician on duty in the emergency room when Dozier was brought to the hospital for serious injuries sustained in a fight, the most severe of which was a deep gash in his right arm from which Dozier

lost a great deal of blood prior to the arrival of an ambulance. Dozier was treated by hospital personnel in the emergency room, including Dr. Joe Choi and appellee, for several hours and was eventually moved to intensive care under Dr. Choi's care. Appellee's notes indicate that while Dozier was in the emergency room 'there was absolutely no active bleeding from Mr. Dozier's visible wound sites.' Shortly thereafter, Dr. R. Kashlan, a surgeon, examined Dozier in consultation with Dr. Choi and discovered, after removing Dozier's bandages, a fairly deep laceration pouring sanguineous material. Dozier was immediately taken to the operating room for exploration of the wound and died during surgery. After Dozier was pronounced dead, Dr. Kashlan sutured the wound before his body was taken to the morgue. An autopsy revealed that hypovolemia (blood loss) due to a stab wound in the upper right arm was the cause of death.

The complaint alleged that appellants, the writers of the articles, editors and publishers of the newspapers, falsely, maliciously and recklessly reported that appellee failed to provide proper treatment to Dozier and allowed him to bleed to death in the emergency room at the hospital. The newspapers first reported Dozier's death on February 22, 1989 in an article entitled, "Case of Man Who Bled to Death in Clayton Hospital Probed." The article stated that the medical examiner subpoenaed the 'emergency medical records of a man who bled to death in Clayton General Hospital at least seven hours after he was taken there with stab wounds in his right arm'; that the records were subpoenaed because of inconsistencies in the time of death and in statements made by hospital officials; that Dozier died on the operating table as doctors tried to repair a severed artery; that the autopsy

showed that Dozier had two severe cuts in his right arm and a cut on his face; and that the cuts in his arm had been sutured. The article also reported that according to the police, Dozier was stabbed at about 1:15 a.m. and was taken to Clayton General at 2:25 a.m.; that at 7:00 a.m., Dozier was wheeled into the operating room; and that he died at 9:17, although a hospital spokesperson reported Dozier died at 10:20 a.m. An investigator from the medical examiner's office was quoted as saying that Dozier bled to death as a result of the arm injury but that much could not be said until the medical records were supplied. Dozier's sister was quoted as follows: 'He apparently bled to death. ... That's was puzzles me. I couldn't believe it. In a hospital? They're supposed to be the ones that stop the bleeding. If it was needed, they would do a blood transfusion, that's what I would think.' (Indention and punctuation omitted.) The hospital spokesperson reportedly said that Dozier died on the operating table but that he did not die from the stab wounds and was treated minute by minute with appropriate treatment. She did not explain why doctors operated four-and-a-half hours after Dozier arrived, nor would she confirm that he received stitches before surgery. Major Dwayne Hobbs of the Forest Park police was quoted as saying that detectives working on the case told him that doctors stitched Dozier up and later emergency room personnel "noticed that he was getting worse and found out he was bleeding again"; that there was blood on a stretcher and Dozier was taken back into surgery where he died; and that appellee treated Dozier in the emergency room and said that Dozier suffered 'a' severe loss of blood, but that if he dies it would be ... from complication of alcohol and drugs in his blood system." The article concluded with a quote from Dozier's mother, 'Sometime I break down. ... I'm just trying

to hold out. I don't know what happened. That's what we're trying to find out.'

On February 23, 1989, a second article was published entitled, 'State Agencies Want Details Of Death at Clayton Hospital,' with the subtitle, 'Cut Artery Reportedly Not Treated for Hours.' This article reported that the Georgia Department of Human Resources ('DHR') and the Composite State Board of Medical Examiners ('CSBME') sought the details of Dozier's treatment in the emergency room. The article restated that Dozier died on an operating table; that initial autopsy findings concluded that he bled to death because of a severed artery in his right arm; and that Forest Park police said that Dozier's injuries were stitched before the severed artery was discovered. Then the article stated that Dozier was treated by appellee for cuts in his right arm and hypothermia; that appellee is a New York native and a graduate of the Autonomous University of Guadalajara, Mexico; that appellee was one of nine emergency room physicians who formed the Atlanta Emergency Group, a private partnership with an exclusive contract with the hospital to provide its emergency room services; that appellee was licensed to practice in Georgia in 1983, six months after receiving his 'doctor's credentials'; and that although appellee listed emergency medicine on his license renewal in 1987, prior to 1987 he listed that he was a psychiatrist. According to the article, the hospital's administrator said that he was conducting his own investigation into the death; that Dozier was suffering from hypothermia and suspected intoxication which may have contributed to the delay in treatment of the artery; and that the spokesperson incorrectly reported the time of death because a doctor had written the wrong time on

Dozier's record. However, he refused to account for the four-and-a-half hour span before the surgery, to state the point at which the doctors determined Dozier needed surgery or to give the name of the surgeon who operated on Dozier. A DHR official is reported to have said her agency would investigate whether state rules and regulations were violated in the emergency room in a broad context, not focusing solely on the Dozier case. The CSBME director reportedly said they would investigate whether the medical treatment fell below standards. The article indicates that if either the hospital or the physician were found to have given inadequate care, both state agencies could file civil charges. None of the remaining 29 articles specifically name appellee or refer to him. The articles only mention the Dozier incident and focus on state and federal investigations into the hospital's practices which eventually expanded beyond the emergency room, other deaths in the hospital, corrective action taken by the hospital, the threat to the hospital's federal funding because of alleged deficiencies, criticism of the hospital's accreditation, the hospital's efforts to improve its image, sanctions against three unnamed physicians, a private group's evaluation of 100 state hospitals, a Clayton County Commission public hearing and grand jury probe into the administration of the hospital and 'negligent' physicians, criticism of the hospital administrator, the {*816} resignation of the administrator and chairman of the hospital authority, the consent agreement between the hospital and the state, the removal of the hospital from the critical list, the expansion of the emergency room and the hiring of a new administrator. Three of the articles involve the firing of the Atlanta Emergency Group and its subsequent suit against the hospital; however, none makes any specific reference to appellee.

1. In their first two enumerations of error appellants contend that the majority of the articles are not of and concerning appellee and that the two articles that do refer to appellee are true and not conclusive as to whether Dozier's death was caused by deficient treatment and therefore cannot be defamatory. 'To sustain an action for libel "the (allegedly) defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff. If the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory. An innuendo can not make the person certain which was uncertain before.' Where the words of the alleged libelous matter are so vague and uncertain that they could not have been intended to refer to any particular person, or the published words are incapable of any other construction other than (that) they are not defamatory of the plaintiff, the petition is subject to (dismissal). (Cits.) 'A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. So the whole item ... should be read and construed together, and its meaning and signification thus determined. When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read." [Cit.]' Fiske v. Stockton, 171 Ga. App. 601, 602 (1) (320 SE2d 590) (1984).

Based on a review of the 31 articles cited by appellee, we conclude at the outset that the 29 articles which do not refer to him specifically or by innuendo are not defamatory. Appellee contends that although the articles do not specifically name him, because he was identified as Dozier's emergency room physician in the first two articles, later references to Dozier's death by implication refer to him. However, those articles make limited reference to the Dozier incident for historical reference, and certainly contain no reflection on any particular individual with regard to Dozier's death. See Armscorp of America v. Daugherty, 191 Ga. App. 19, 20 (380 SE2d 729) (1989); Fiske, supra. In our view, the average reader would not draw the conclusion that appellee carelessly let Dozier bleed to death in the emergency room or that his treatment was otherwise deficient. Macon Telegraph Pub. Co. v. Elliott, 165 Ga. App. 719 (1) (302 SE2d 692) (1983).

Moreover, the February 22 and 23, 1989 articles in their entirety also cannot be reasonably construed to be defamatory. First of all, the articles clearly state that Dozier died on the operating table during surgery, not in the emergency room, and the newspapers reported an unexplained four-and-one-half hour delay in the surgical repair of the severed artery. Secondly, what is written specifically about appellee is essentially true. Appellee complains that the Atlanta Emergency Group is a professional corporation and not a private partnership; however, this error is not significant. Appellee also complains of certain omissions which create a false impression of his treatment of Dozier, specifically, the newspapers' failure to report that Dozier lost a large amount of blood before arriving at the hospital, the fact that appellants chose to focus on particular aspects of his background and the

fact that the CSBME determined he did not violate any provisions of the Medical Practice Act in his treatment of Dozier. Appellee points to reporter's notes which indicate that one of the reporters was aware of the CSBME ruling and contends that the newspapers' failure to report the ruling is evidence of the newspapers' recklessness or a deliberate attempt to create a negative impression of his treatment. "'An omission of information from a statement admittedly published will not support an action for libel. (Cit.)' (Cit.)' [Cit.]' Yandle v. Mitchell Motors, 199 Ga. App. 211 (404 SE2d 313) (1991). While the newspapers might have had a moral obligation to do a follow-up story on the CSBME's findings, there apparently was no legal obligation for them to do so.

In addition, appellee complains that the February 22 article falsely reported that Forest Park police sources claimed doctors stitched Dozier up and later that emergency room personnel noticed that the bleeding was getting worse because Major Hobbs, who was quoted in the article, testified later in a deposition that he did not recall providing such information. The February 23 article also indicated that Forest Park police said that Dozier's injuries were stitched before the severed artery was discovered. This statement is clearly contradicted by Dr. Kashlan's report which indicates that the arm wound was not sutured prior to the surgery. However, neither article states that appellee sutured the arm, that the suturing was negligently performed or that the suturing resulted in Dozier's death. The articles also indicated that other doctors were involved in his treatment. We agree with appellants that the thrust of the articles is that days following Dozier's death it was unclear what care rendered by Clayton General possibly contributed to his death. Both articles reported that various

entities were looking into the circumstances surrounding Dozier's death and Clayton General's role, not that appellee's treatment was deficient. Moreover, notwithstanding appellee's contentions, 'in considering whether a writing is defamatory as a matter of law, we look not at the evidence of what the extrinsic circumstances were at the time indicated in the writing, but at what construction would be placed upon it by the average reader. [Cits.]' Macon Telegraph, supra at 721. In our view, "the words of the [articles] contain no hurtful innuendo regarding appellant's character or behavior and a reader's subjective decision to impute such innuendo to the [articles] is not actionable as a defamation. (Cit.)' [Cit.] The articles "[lack] the element of personal disgrace necessary for defamation.' (Cit.)' [Cit.]' Mead v. True Citizen, 203 Ga. App. 361, 362 (417 SE2d 16) (1992). Therefore, because the 31 articles are not defamatory, the trial court erred in denying appellants' motion for summary judgment.

2. Based on the foregoing we need not consider appellants' remaining enumerations of error.

Judgment reversed.

Appendix C

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE

ATLANTA

DATE: APRIL 8. 1993

CASE NO. S93C0570

GRANT R. BAKIN V. COX ENTERPRISES, INC., d/b/a THE ATLANTA JOURNAL AND CONSTITUTION ET AL.

COURT OF APPEALS CASE NO. A92A1045

The Supreme Court today denied the petition for certiorari in this case.

All Justices concur.

Appendix D

CASE OF MAN WHO BLED TO DEATH IN CLAYTON HOSPITAL PROBED

By: Elizabeth Coady; February 22, 1989.

The Clayton County medical examiner has subpoenaed the emergency medical records of a man who bled to death in Clayton General Hospital at least seven hours after he was taken there with stab wounds in his right arm.

Gregory Alfonzo Dozier, 26, was taken to the hospital by rescue workers about 2:25 a.m. Sunday after he was cut twice during a "drunken brawl" with an acquaintance, police said.

He died - police say at 9:17 a.m and the hospital says at 10:20 a.m. - on the operating table while doctors were trying to mend a severed artery, police said. They began operating on him at 7 a.m. - 4 1/2 hours after he arrived, a hospital spokeswoman confirmed.

He bled to death as a result of the injuries he sustained on the arm," said police Lt. J.M. Shockley, an investigator with the DeKalb County medical examiner's office, where the autopsy was done. "He didn't have any other injuries. We really can't say a whole lot until we get the medical records from Clayton."

"He apparently bled to death," said Linda Dozier, the dead man's younger sister. "That's what puzzles me. I couldn't believe it. In a hospital?

"They're supposed to be the ones that stop the bleeding. If it was needed, they would do a blood transfusion that's what I would think."

The autopsy, performed by Dr. Joseph Burton, showed that Mr. Dozier had two severe cuts in his right arm and a cut on his face. The autopsy also showed that the cuts in his arm had been sutured.

Bobby Hays, a hospital spokeswoman, confirmed that Mr Dozier died on the operating table. But she said that he "did not die from the stab wounds. The man had more injuries than you have been told. He was treated minute by minute."

She did not explain why doctors operated on the severed artery 4 1/2 hours after Mr. Dozier arrived at the hospital. Nor would she confirm that Mr. Dozier had received stitches before the surgery.

Reached late Tuesday at his home, Dennis Scheidt, the hospital's administrator, said, "I don't know anything about it. I've been home sick all day with the flu. You'll have to call me in the morning during normal office hours and I'll be happy to talk to you about it."

In addition to the discrepancy of more than an hour over the time of death, information received from Forest Park

investigators on how hospital officials treated Mr. Dozier conflicts with what hospital officials say.

"That's why we subpoenaed the medical records," Lieutenant Shockley said.

Mr. Dozier was a high school dropout who had worked as a roofer for the past year. He was sixth oldest of nine children. Family members say he did not have a permanent address and that sometimes he stated at a Clayton County night shelter.

Mr. Dozier was allegedly stabbed and cut by glass during a fight about 1:15 a.m. Sunday with Mose "Pete" Thomes, 51, a Forest Park man with whom the dead man had occasionally stayed.

Police say M. Thomes, 51, stabbed Mr. Dozier with a butcher knife after he refused to leave his apartment. Both men had been drinking, police said.

During the fight, Mr. Dozier went outside and punched some glass - which could have resulted in some of his wounds, police said.

Although police initially said they would charge Mr. Thomes with murder, so far they have only filed and aggravated assault charge against him. He is being held in the Forest Park jail; his bond has not been set, police said.

"We don't know that he's responsible for the murder yet," Forest Park police Major L. Dwayne Hobbs said. "It means that we got some more investigating to do."

Forest Park patrol officers who responded to the call about a fight found Mr. Dozier "incoherent" on the ground outside Mr. Thomes apartment next to a dumpster. They summoned city paramedics, who treated Mr Dozier at the scene, then took him to Clayton General at 2:25 a.m., police said.

On Monday, Major Hobbs said detectives working the case told him that doctors "stitched" Mr. Dozier up. Then later emergency room personnel "noticed that he was getting worse and found that he was bleeding again. There was blood on the stretcher and they took him back into [surgery] and he subsequently died," Major Hobbs said.

He said his detectives were told that Mr. Dozier died at 9:17 a.m. Sunday.

Major Hobbs said hospital officials told him Tuesday that Mr. Dozier had received constant medical attention.

Major Hobbs also said Dr. **Grant Bakin, the emergency room physician who treated Mr. Dozier**, told investigators that Mr. Dozier had suffered a s"severe loss of blood, but that if he died it would [be]...from complication of alcohol and drugs in his blood system."

Efforts to reach Dr. Bakin for comment were unsuccessful Tuesday, as were attempts to reach Dr. Burton to

ask him whether alcohol or drugs were a contributing factor in the death.

Ms. Hays, the hospital spokeswoman, said Mr. Dozier was wheeled into the operating room at 7 a.m. - when the emergency room shift changed - and died on the table at 10:20 a.m. She refused to confirm that his arm had been stitched before the cut artery was discovered. She also would not say what other medical attention Mr. Dozier received.

"I can't give you that detailed medical information," she said. "He was attended minute by minute and his treatment was appropriate."

Family members are not so sure.

"Sometime I break down," said Izora Dozier, the victim's mother. "I'm just trying to hold out. I don't know what happened. That's what we're trying to find out."

STATE AGENCIES WANT DETAILS OF DEATH AT CLAYTON HOSPITAL- CUT ARTERY REPORTEDLY NOT TREATED FOR HOURS

By: Elizabeth Coady And Mike Christensen; February 23, 1989.

Officials from two state agencies and Clayton General Hospital said Wednesday that they will investigate the case of a Forest Park man who bled to death after seven hours at the hospital.

Spokespersons for both Georgia's Department of Human Resources (DHR) and the Composite State Board of Medical Examiners said they want to know the details of the treatment Gregory Alfonzo Dozier was given when he was brought into the emergency room about 2:25 a.m.

Mr. Dozier, who suffered from stab wounds and cuts, died on an operating table at 9:17 a.m. Sunday, hospital officials confirmed Wednesday.

Initial findings of an autopsy performed by Clayton medical examiner Joseph Burton concluded the man bled to death because of a severed artery in his right arm. Forest Park police have said Mr. Dozier's injuries were stitched before the severed artery was discovered.

Mr. Dozier, 26, of Forest Park, was treated by Dr. Grant Robin Bakin for cuts in his right arm and hypothermia, according to police.

State records show Dr. Bakin is a New York native who received his medical school training at the Autonomous University of Guadalajara in Mexico.

Dr. Bakin is one of nine emergency room physicians who form the Atlanta Emergency Group, a private partnership that has an exclusive contract with the hospital to perform its emergency room services.

A sign in the room tells patients: "The emergency department at Clayton General Hospital is staffed by

physicians who are independent contractors and not employees."

Through his secretary, Dr. Bakin declined comment on Mr. Dozier's death and the events surrounding it.

Dr. Bakin was licensed to practice in Georgia in 1983, six months after he received his doctor's credentials. Until December 1987, however, he listed himself on applications for license renewals as a psychiatrist. He indicated on the 1987 application that he was performing emergency medicine.

Dennis Scheidt, the hospital's administrator, said Wednesday he will conduct his own investigation into the death. He said Mr. Dozier was suffering from hypothermia and suspected intoxication when he was brought to the hospital, which may have contributed to the delay in treatment for the artery.

Mr. Scheidt also said a hospital spokeswoman incorrectly reported Mr. Dozier's time of death as 10:20 a.m. because a doctor had written the wrong time on the man's medical record.

However, he refused to say why it took 4 1/2 hours for surgeons to operate on Mr. Dozier's artery; at what point doctors noticed that the man needed surgery; or to give the name of the doctor who operated on Mr. Dozier.

"There's no reason for me to release that." he said.

Marge Smith, deputy director of DHR's Office of Regulatory Services, which governs the licensing of Georgia's hospitals, said her agency will investigate whether state rules and regulations were violated.

"That investigation will be limited to emergency room services at this point." Ms. Smith said. "We will interview staff; we will look at records. ... We will examine a good many records. We will look at the issues of emergency services in a broader context. We won't be just looking at this case."

Georgia's Composite State Board of Medical Examiners wants to find out whether Mr. Dozier's medical treatment "fell below medical standards," said the board's director Andrew W. Watry.

If either the hospital or the physician is found to have given inadequate care, both state agencies could file civil charges and/or fines against the guilty parties.

The 51-year-old man accused of stabbing Mr. Dozier was bound over to Clayton County State Court Wednesday afternoon on an aggravated assault charge. Mose "Pete" Thomes allegedly stabbed Mr. Dozier because he refused to leave Mr. Thomes's Forest Park apartment. Police say he will not be charged with murder because they believe Mr. Dozier cut himself when he punched his fist through Mr. Thomes's apartment window.

STATE OKs CLAYTON'S HOSPITAL PLAN

By: Alfedo Azzis; January 12, 1991.

Clayton General Hospital's plan to double the size of its emergency room won approval Friday from the State Health Planning Agency, an agency spokesman said.

Hospital officials said the emergency room is the third busiest in Georgia and has become so crowded that doctors have been treating patients on stretchers in hallways. "We're very excited," said marketing director Una Newman. "This will give our physicians more space to work."

The hospital expects to begin the $3.7 million renovation immediately and expects to finish the work by fall, hospital spokeswoman Beth Fore said.

The improvements will include new heart monitoring equipment, separate trauma facilities and ambulance dock and the addition of nearly 9,000 square feet of space, including a larger working area.

In August, the county Hospital Authority asked the state for permission to expand after a consultant estimated the hospital could expect a 27 percent increase in emergency room patients in the next five years.

The emergency room treats more than 52,000 patients each year, making it the state's third-busiest, behind Grady Memorial and Kennestone hospitals, according to the consultant's study.

The number of emergency room patients seeking treatment at Clayton General is expected to reach about 64,000 per year.

Two years ago, Clayton General was the target of state and federal investigations after a 26-year-old man bled to death in the emergency room. As a result the hospital fired its emergency room service provider, and the hospital's chief administrator resigned.

Appendix E

DOZIER MEDICAL CHRONOLOGY

1. Ambulance trip report - "Large laceration right arm, biceps area - hemorrhage stopped.

2. Emergency Room Report
   (a) 2:39 am. - Arrived at hospital
   (b) 3:00 am. - First triaged - vital signs first taken/condition assessed
   (c) 3:05 am. - Covered with warm blankets
   (d) 3:22 am. - Dr. Bakin ordered complete blood count (CBC)
   (e) 3:22 am. - Alcohol blood level obtained
   (f) 3:24 am. - (Approximately) Right femoral catheter was established for intravenous fluids
   (g) 3:27 am. - Dr. Bakin ordered electrocardiogram (EKG)

3. Single Summary Report (page 3)
   3:45 am. - Dr. Bakin orders blood warmer and bags

4. Single Summary Report (page 6)
   (a) 3:45 am. - Completed blood count (CBC) (ordered at 3:22 am) is collected

   Outpatient Summary Report (page 4)
   (b) 3:45 am. - Results of blood alcohol (ordered at 3:22 am.) - showed significant

intoxication (0.28 gm/dl) (>0.1% in Ga. is intoxication)

5. Emergency Room Report

(a) 3:46 am. - Dr. Bakin ordered BUN, sodium, potassium, chloride, carbon dioxide, glucose, and creatinine blood tests (SMA 6)

Outpatient Summary Report (page 4)

(b) 3:47 am. - Results available - low levels of glucose and carbon dioxide and elevated creatinine (kidney enzymes) were shown.

6. Single Summary Report (page 6)

3:55 am. - Results of complete blood count (CBC) (ordered at 3:22) available as per Dr. Choi - (hemoglobin - 10.5, hematocrit 32.3 - were slightly low)

7. Emergency Room Report

3:56 am. - Dr. Bakin ordered an Arterial Blood Gas (ABG)

8. Outpatient Summary Report - Chemistry - (page 3)

4:00 am. - ABG ordered at 3:56 am. is collected

9. Emergency Room Report

4:05 am. - Temperature taken second time, 90.5 (temp down despite attempts at warming) Prior to this time

nasogastric tubing had been inserted and warm fluids infused to warm and rehydrate Mr. Dozier through his digestive system. *Also noted on Dr. Bakin's ER report

10. Emergency Room Report
    (a) 4:09 am. - Dr. Bakin orders Blanketral to warm Dozier
    (b) 4:09 am. - Dr. Bakin orders 4 units of blood to be typed and cross matched, in preparation for transfusion
    (c) 4:09 am. - Dr. Bakin orders complete skull x-ray

11. Outpatient Summary Report - Chemistry - (page 3)
    4:11 am. - Arterial blood gas (ABG) results reported - serious respiratory problems are shown - Dozier's respirations are being mechanically assisted.

12. Radiology Report
    4:15 am. - X-ray to check location of endometrial tube

13. Radiology Report
    (a) 4:19 am. - X-ray done of Dozier skull
    (b) 4:19 am. - Nasogastric tube is located in place

14. Death Summary by Dr. Choi

4:45 am. - Dr. Choi takes over the case. Dr.Bakin relieved of duty.

15. Outpatient Summary Report - Chemistry - (page 3)

(a) 4:52 am. - Second Arterial Blood gas is collected

(b) 4:56 am. - Second Arterial Blood gas reported

16. Emergency Room Supplementary Sheet

5:00 am. - Blanketral applied, temperature 88.4

17. Single Summary Report (page 3)

5:07 am. - 4 units of blood were typed and cross matched

18. Emergency Room Supplementary Sheet

(a) 5:15 am. - Being treated in ER for shock and low blood pressure

(b) 5:30 am. - Spoke with Dr. Kashlan - refused to come in

(c) 5:50 am. - Unable to get IV's going - Dr. Kashlan agreed to come in to put in central venous pressure line (CVP) - heart rate slowing to 62 beats per minute

(d) 6:10 am. - Attempt to put in central venous pressure line (CVP) line by Dr. Bakin, called back by Dr. Choi

(e) 6:20 am. - Chest x-ray taken to check CVP line position

19. Radiology Report

6:25 am. - Report of location of CVP line position

20. Emergency Room Supplementary Sheet

6:30 am. - Transported to intensive care unit (ICU unit)

21. Radiology Report

6:57 am. - Chest x-ray done to check CVP line placement

22. Transfusion Flow Sheet

7:10 am. - First of 4 units of blood transfused. (subsequent units transfused at 8:25 am., 8:40 am., and 9:05 am.)

23. ICU Nurses Notes

(a) 7:30 am. - ICU receives Dozier from ER on vent

(b) 8:15 am. - Dr. Kashlan sutured laceration at left temple. - chest x-ray done

24. Operative Report

8:30 am. - Anesthesia begun in OR

25. Operative Report of Dr. Kashlan

9:17 am. - Dozier pronounced dead by Dr. Achecar

Appendix F

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GRANT BAKIN, M.D.,	:	
Plaintiff,	:	CIVIL ACTION
v.	:	D074346
COX ENTERPRISES, INC., d/b/a	:	
THE ATLANTA JOURNAL AND	:	
CONSTITUTION, ELIZABETH	:	
COADY, et. al.,	:	
Defendants.		

STATE OF GEORGIA
COUNTY OF DEKALB

AFFIDAVIT

PERSONALLY APPEARED BEFORE ME, the undersigned officer, duly qualified to administer oaths, J.M. Shockley, who after being duly sworn, deposes and states on oath AS FOLLOWS:

1.

I am over the age of eighteen years, am competent to testify as to the matters contained herein and this affidavit is given upon my personal knowledge, for use in the above-styled action and for any other purposes allowed by law.

2.

In February 1989 I was an investigator with the office of Joseph Burton, M.D., who was (and still is) the medical examiner for Clayton County. I started working for the medical examiner's office in 1981. Prior thereto, I worked for the DeKalb County Police Department for 10-11 years. Six and one-half of my years with the DeKalb Police Department was in the capacity of a homicide detective. I was not director of the medical examiner's office in February 1989; I was the chief administrator. I am not, and have never been, the spokesperson for the Clayton County medical examiner's office. In February 1989 I did not routinely comment to the press every day of the week. I tried to let the medical doctors communicate to the press.

3.

I read the following newspaper article the day that it was published: 2-22-89 Wed., Coady, p. 1A, "Case of Man Who Bled to Death in Clayton Hospital Probed."

4.

Soon after reading the article that morning, February 22, 1989, I spoke with Elizabeth Coady, and told her that in that article she had misquoted me, taken me out of context, and that I did not say what she attributed to me.

5.

I am not a medical doctor and I did not give Ms. Coady a medical opinion. The cause of death of Gregory A. Dozier calls for a medical opinion. I did not state to her an opinion with regard to the cause of death of Gregory A. Dozier. I would never provide a cause of death without a final report by Dr. Burton. The final report of Dr. Burton was not issued until March 25, 1989.

6.

I did not at any time tell Ms. Coady that Mr. Dozier died of blood loss.

7.

I did not at any time tell Ms. Coady that Mr. Dozier bled to death.

8.

I did not ever tell Ms. Coady that Mr. Dozier bled in the Clayton General emergency room.

9.

I did not ever tell Ms. Coady that Mr. Dozier bled significantly in the Clayton General emergency room.

10.

I did not ever tell Ms. Coady that Mr. Dozier bled in the Clayton General Hospital.

11.

I did not ever tell Ms. Coady that Mr. Dozier bled significantly in the Clayton General Hospital.

12.

I did not discuss with Ms. Coady hypothermia, hypovolemia, alcohol level, or drug abuse, concerning Mr. Cozier. I do not recall Ms. Coady asking me about drugs or alcohol with reference to Gregory A. Dozier. When Ms. Coady called me I did not have Dr. Burton's final report or the medical records.

13.

The brief discussion that I had with Ms. Coady about "injuries" was only regarding lacerations or bruises. In that context, I told her that Mr. Dozier had a cut on his arm.

14.

I did not tell Ms. Coady <u>when</u> sutures were placed on Dozier's arm. I do not recall Ms. Coady asking me <u>when</u> sutures were placed on Mr. Dozier's arm.

15.

I never told Ms. Coady that Mr. Dozier's only problem was the cut to his arm.

16.

I did not verbally provide to the Atlanta Journal and Constitution at any time an opinion with regard to the cause of death of Gregory A. Dozier. The only written report of an opinion of the cause of death that I provided to the Atlanta Journal and Constitution was my mailing a copy of Joseph Burton, M.D.'s March 15, 1989 written report, to Elizabeth Coady, in response to her March 15, 1989 letter (attached hereto as Exhibit A.), and to the Atlanta Constitution and Journal's lawyers in response to a nonparty discovery request.

17.

A lawyer for the Atlanta Journal and Constitution faxed to me a proposed affidavit to sign, with regard to the above styled civil action. I made changes on that proposed affidavit and faxed it back to the attorney. I never received a response.

Further affiant sayeth not.

/s/ _____
J.M. Shockley

Sworn to and subscribed before me
this 18th day of July, 1991.

/s/ _____
Notary Public

Appendix G

1) "Initial findings of an autopsy performed by Clayton medical examiner Joseph Burton concluded the man bled to death because of a severed artery in his right arm. 2/23/89.

2) "...**the emergency room, where a 26-year-old man bled to death seven hours after he arrived**...." 3/4/89.

3) "A federal agency Monday threatened a halt to Medicare and Medicaid payments and expanded an investigation of Clayton General Hospital after finding serious violations of medical standards in its emergency room, where a 26-year-old man bled to death last month, officials said." 3/7/89.

4) "The inquiry was prompted by reports in The Atlanta Journal-Constitution that a man bled to death after seven hours in the hospital's emergency room Feb. 19. 3/8/89.

5) "Dozier...died on an operating room table **from massive blood loss nearly seven hours after arriving in the emergency room**." 3/12/89.

6) "a man who reportedly **bled to death** Feb. 19 **nearly seven hours after arriving at the emergency room**." 3/15/89.

7) "The Clayton County medical examiner ruled Wednesday that a stabbing victim bled to death in the Feb. 19 case that has prompted state and federal investigations and the dismissal of a physicians group

that operates the emergency room at Clayton General Hospital. 3/16/89.

8) "...a **26 year old man died in Clayton General Hospital's operating room from blood loss after being held in the hospital emergency room for more than seven hours...**" 3/19/89.

9) "Mr. Dozier **bled to death in the hospital's emergency room** Feb. 22..." 3/20/89.

10) "The hospital's response comes a month after news reports of a patient's death in the emergency room prompted state and federal investigations." 3/23/89.

11) "after a **26-year-old man bled to death** there Feb. 19." 3/24/89.

12) "The 367-bed hospital was investigated when **a 26-year-old man bled to death** Feb. 19, seven hours after arriving there with a severed artery." 3/28/89.

13) "Investigators, on orders from the federal Health Care Financing Administration (HCFA), inspected Clayton General after 26-year-old Gregory Alfonzo Dozier bled to death there Feb. 19." 3/30/89.

14) "A federal investigation was launched five weeks ago when **a stabbing victim bled to death after seven hours in the hospital's emergency room.**" 4/1/89.

15) "Inspectors from the state Department of Human Resources (DHR) inspected the hospital after a **26-year-old man bled to death seven hours after arriving in its emergency room** Feb. 19." 4/13/89.

16) "Clayton's only hospital has been under intense scrutiny from state and federal health officials since Feb. 19, when a **26-year-old stabbing victim bled to death seven hours after arriving in the emergency room.**" 4/26/89.

17) "Clayton General came under intense scrutiny after a **26-year-old man bled to death seven hours after arriving in its emergency room** Feb. 19." 4/29/89.

18) "The ordeal--reports that a patient **bled to death at the hospital**, and the investigations and adverse publicity that followed--was 'tempering,' said Mr. Scheidt...Mr. Scheidt had been working a lot of overtime since shortly after a **26-year-old man bled to death seven hours after arriving in the emergency room** Feb. 19." 5/4/89.

19) "State and federal officials investigated the facility after a **26-year-old man bled to death there Feb. 19, seven hours after arriving in the emergency room.**" 6/3/89.

20) "Clayton General has been the target of state and federal investigations since February, when a 26 year old man bled to death seven hours after arriving at the hospital;s emergency room." 6/8/89.

22) "The investigation was prompted by reports that a **26-year-old man bled to death at the hospital** Feb. 19." 10/11/89.

23) "After a **26-year-old roofer bled to death in the emergency room** in February, government investigators invaded the hospital, virtually holding the institution prisoner to their demands for change." 10/14/89.

24) "...a 10-month period of crisis for the hospital, which faced intense criticism and government scrutiny after a **Forest Park roofer's assistant allegedly bled to death following seven hours in the hospital's emergency room** in February." 11/11/89.

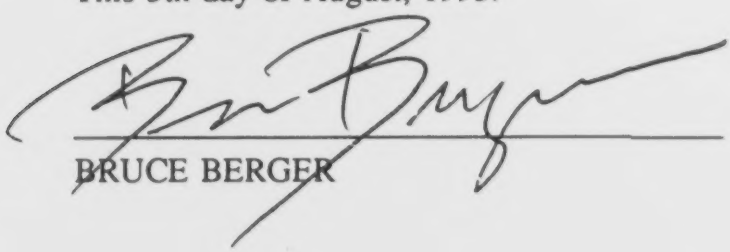
25) "Two years ago, Clayton General was the target of state and federal investigations after a **26-year-old man bled to death in the emergency room**." 1/12/91. This article also states that the emergency care provider (previously identified as Dr. Bakin) was fired thus alleging a specific sanction, which in fact did not occur.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing Petition for Writ of Certiorari and all Attachments thereto by U.S. Mail properly stamped and addressed to counsel for Respondents, pursuant to United States Supreme Court Rule, as follows:

Peter C. Canfield, Esq.
Dow, Lohnes & Albertson
Suite 1300, One Ravinia Drive
Atlanta, Georgia 30346

This 5th day of August, 1993.



BRUCE BERGER

(2)

Supreme Court, U.S.
FILED

No. 93-195

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

GRANT R. BAKIN, M.D.,

Petitioner,

v.

COX ENTERPRISES, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Georgia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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v.

COX ENTERPRISES, INC., et al.,

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On Petition For A Writ Of Certiorari
To The Court Of Appeals Of Georgia[1/]

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Respondent Cox Enterprises, Inc. respectfully submits this Opposition to

---

1/ Petitioner has erroneously petitioned this Court for a writ of certiorari to the Supreme Court of the State of Georgia. Petitioner seeks review of the judgment of the Court of Appeals of Georgia.

the Petition for a Writ of Certiorari of Petitioner Grant R. Bakin, M.D.[2/]

JURISDICTION

Petitioner asserts that this Court's jurisdiction in the case exists under 28 U.S.C. § 1257(a) (1988). Pet. at 2. That section allows this Court to review state court judgments in three situations: "where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . ."

2/ A list of Respondent's subsidiaries, in compliance with Rule 29, is attached hereto as Exhibit A.

This case presents none of the three bases for jurisdiction prescribed by 28 U.S.C. § 1257(a). The ruling of the Court of Appeals of Georgia was based solely on its application of Georgia state libel law to the facts before it. Moreover, the Petitioner never raised any federal challenge to that court's interpretation of Georgia libel law either before the Court of Appeals of Georgia or before the Georgia Supreme Court. This Court therefore lacks jurisdiction to review the decision of the Court of Appeals of Georgia.

SUMMARY OF THE ARGUMENT

Petitioner challenges a judgment in which the Court of Appeals of Georgia found, as a matter of Georgia state law, that 31 articles published

by Respondent contained no harmful statements or hurtful innuendo of and concerning the Petitioner. Petitioner failed to raise any federal challenge to the ruling of the Court of Appeals of Georgia in any Georgia court. Because the Court of Appeals of Georgia did not rule on any issue of federal law, and because the Petitioner has not preserved any federal challenge to that court's interpretation of Georgia law, this Court must deny the Petition for Certiorari.

ARGUMENT

I. PETITIONER'S INDEPENDENT APPELLATE REVIEW ARGUMENT WAS NOT RAISED IN ANY PORTION OF THE STATE COURT PROCEEDINGS.

It is well settled that this Court will not hear arguments "not pressed or passed upon below." FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 217

(1990). See also Youakim v. Miller, 425 U.S. 231, 234 (1976) (per curiam); Clark v. Jeter, 486 U.S. 456, 459 (1988) (when reviewing state court decisions, the Supreme Court will not decide federal claims unless "pressed or passed upon" below). Because Petitioner failed to raise the applicability of the independent review doctrine in any court below, he is precluded from raising the issue in this Court.

The Rules of the Supreme Court of the United States further illustrate the shortcomings in Petitioner's arguments. Rule 14(h) mandates that when the Petitioner seeks review of a state court decision, he must provide specific references as to where, in both trial and appeals courts, the

federal issue was raised below, as well as how the courts passed upon it. Petitioner has not complied and cannot comply with this rule because the alleged federal issue brought before this Court was neither raised nor passed upon below.[3/] Under Supreme Court Rule 14.5 such noncompliance constitutes proper grounds for denial of this Petition.

3/ Furthermore, the independent appellate review doctrine as enunciated in Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984), applies only in "reviewing a determination of actual malice in a case governed by New York Times v. Sullivan." Bose, 466 U.S. at 514. The Georgia Court of Appeals did not rule on the issue of actual malice or on any other constitutional issue. Hence there would have been no basis for Petitioner's unusual independent appellate review argument even if it had been properly raised below.

II. THE COURT OF APPEALS OF GEORGIA BASED ITS RULING WHOLLY ON STATE LAW GROUNDS.

Petitioner cites three legal aspects of the Court of Appeals of Georgia decision with which he disagrees, and for which he seeks review. The rulings in question pertain to (1) the lack of references to Petitioner in 29 of the challenged articles, (2) the average reader's inability to infer the alleged implied defamations, and (3) the lack of any hurtful innuendo regarding Petitioner in the articles. Pet. at 9-10.

The first challenged aspect of the ruling below is based on the Georgia requirement that in order to be considered defamatory, an article must be "of and concerning" the plaintiff. See Ledger-Enquirer, Co. v. Brown, 214

Ga. 422, 423, 105 S.E.2d 229, 230 (1958) (In order to state a claim under Georgia libel law, "[t]he defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff.").

The second challenged aspect of the ruling below is based on the Georgia requirement that the presence of defamatory content must be evaluated from the point of view of the average reader. See Southern Business Mach. v. Norwest Fin. Leasing, Inc., 194 Ga. App. 253, 260, 390 S.E.2d 402, 408, (in determining whether a writing is libelous under Georgia law, courts consider the construction given by an average reader) (citations omitted), cert. denied, 194 Ga. App. 912 (1990).

The final aspect of the ruling of the Court of Appeals of Georgia challenged by Petitioner rests on the Georgia requirement that in order to be ruled defamatory, a statement must contain some hurtful innuendo relating to the plaintiff. See Armscorp of America, Inc. v. Daugherty, 191 Ga. App. 19, 20, 380 S.E.2d 729, 730 (1984) (Under Georgia libel law, "[i]f the words used really contain no reflection on any particular individual, no averment or innuendo can make them defamatory.") (citation omitted).

The penultimate sentence of the opinion of the Court of Appeals of Georgia confirms that the sole basis for its ruling was that the challenged publications did not satisfy the Georgia criteria for a defamation

action. Pet. at 11a ("Therefore, because the 31 articles are not defamatory, the trial court erred in denying appellant's motion for summary judgment.") (emphasis added).

Because the ruling challenged by Petitioner is based wholly on Georgia state libel law, and because Petitioner failed to raise any federal challenge to that ruling below, this Court is bound to accept the ruling of the Court of Appeals of Georgia. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1972) (Supreme Court's "only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.") (citations omitted).

CONCLUSION

The Court of Appeals of Georgia based its ruling solely on state law grounds and Petitioner failed to raise any federal challenge to that ruling below. This Court thus lacks jurisdiction to review that judgment. Therefore, based upon the foregoing, Respondent Cox Enterprises, Inc. respectfully requests that Dr. Bakin's Petition for a Writ of Certiorari be denied.

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EXHIBIT A

Cox Enterprises, Inc., a Delaware corporation, is itself the ultimate parent company and all of its subsidiaries (except wholly-owned subsidiaries) are listed below (all of the below-listed corporations are indirect subsidiaries of Cox Enterprises, Inc. and except as otherwise noted, incorporated in the State of Delaware):

Manheim Auctions, Inc.
- Arizona Auction Services, Inc.
- Atlanta Auto Auction, Inc.
- California Auto Dealers Exchange, Inc.
- Colorado Auto Auction Services Corporation
- Florida Auto Auction Orlando, Inc.
- Fredericksburg Auto Auction, Inc.
- Fresno Auto Dealers Auction, Inc.
- Georgia Auction Services, Inc.
- Kansas City Auto Auction, Inc.
- Manheim Services Corporation
- Manheim Finance Canada, Inc.
- Manheim Auto Auctions Limited
- Manheim Auto Resale Services, Inc.
- Manheim Auctions Government Services, Inc.
- Manheim Investments, Inc.

Manheim's Metro Detroit Auto Auction, Inc.
Missouri Auction Services Corporation
National Auto Dealers Exchange, Inc.
New York Auto Auction Services, Inc.
New England Auto Auction, Inc.
New Manheim Auto Auctions Limited
North Carolina Services Corporation
Texas Auto Auction Services, Inc.
The Gold Book Inc. (a Georgia corporation)
Wisconsin Services Corporation
Cox Cable Cleveland Area, Inc.
Cox Cable Saginaw, Inc.
Cox Cable Quad Cities, Inc.
Cox Cable Spokane, Inc.